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### *The Kennedy Amendment on Commerce Appropriations*

## **“Hate Crimes” Legislation Reappears**

*The Senate recently adopted Senator Kennedy's hate-crimes amendment to the Commerce Appropriations Bill, S. 1217. Tomorrow, the House Judiciary Committee will hold a hearing on hate crimes. Renewed interest in hate crimes has been prompted in part by several brutal murders during the past 15 months. This paper reviews some of the recent history and examines Senator Kennedy's amendment.*

Under current federal law, it is unlawful to injure, intimidate, or interfere with any person because of his or her “race, color, religion, or national origin” if the person is participating in certain federally protected activities such as attending school, serving as a juror, traveling in interstate commerce, using public accommodations, or working. 18 U.S.C. §245. Since 1994, federal law also has required a heavier sentence for persons convicted of certain hate crimes. 28 U.S.C. §994 nt.

**The Amendment.** The Kennedy amendment (which was adopted by the Senate on a voice vote) would delete the statutory requirement that there be a federally protected activity and create a federal crime for willfully causing (and for certain attempts to cause) bodily injury to any person because of the actual or perceived race, color, religion, or national origin of any person regardless of whether the victim was engaged in one of the activities now specified. Additionally, the Kennedy amendment would create a federal crime for intentionally inflicting (and for some attempts to inflict) bodily injury on a person because of such person's actual or perceived sexual orientation, gender, or disability if the crime was in (or affected) interstate or foreign commerce. The amendment's definition of “commerce” encompasses virtually every crime committed within the United States.

**The Amendment Discriminates.** The Kennedy amendment is, as it must be, purposefully discriminatory. It treats some crimes more seriously than other crimes because of the professed motivations of the criminal. Hate crimes laws divide victims of crime *who otherwise would be equally situated because they have been equally harmed* into two distinct, government-endorsed categories: those who have suffered terrible crimes and those who have suffered the same terrible crimes but whose attackers possessed certain identified motivations. Victims who suffered bodily injury but whose attackers did not demonstrate a specified motivation are not entitled to the same measure of justice that is extended to other victims.

**Hate Crimes at Columbine High School?** The inherent discrimination in a hate crimes law can be demonstrated by considering how one might have been applied in the tragedy at Columbine High School. We do not know what motivated the Columbine killers (although there is much conjecture), but we do know that a hate crimes law would have ensured that some of their murders would count as more horrible than others.

If one student had been murdered because of his race and another because of her religion, a hate crimes law would have regarded those crimes as more terrible than a third murder that may have been motivated by a victim's athletic ability, and a fourth murder that may have been motivated by causes unknown. Surely, though, such distinctions ~~would have been lost~~ on the grieving families, the shattered community, and a puzzled nation.

**Hate Crimes Laws Exclude Most Victims of Crime.** In their important book, *Hate Crimes: Criminal Law & Identity Politics* (Oxford University Press, 1998), Professor James B. Jacobs and Attorney Kimberly Potter explain the *raison d'être* of hate crimes laws in this way:

"Hate crime laws are based on the belief that all crime is not created equal; rather, crimes motivated by certain prejudices are worse than crimes similar in every respect other than motivation. Not surprisingly, that assumption is likely to be controversial. Many will argue that all perpetrators of serious crime are equally deserving of condemnation and all victims equally deserving of sympathy.

"It might be tempting to conclude that jealousies and resentments over exclusions from the hate crime laws can be avoided by drafting these laws to include all salient prejudices. While that would solve the problem of disparaging some groups' victimizations in comparison to others', it would also negate the primary purpose of the hate crime laws: to specially condemn offenders with certain prejudices and specially recognize their victims. Hate crime laws only make sense if certain bigoted offenders are condemned more forcefully and punished more severely than offenders who commit the same crime but for nonprejudiced reasons. It is the *exclusion* that gives these laws their symbolic power and meaning." (Emphasis in original.)

**Hate Crimes Are *Not* Uniquely Frightening.** It is an axiom among supporters of hate crimes laws that hate crimes themselves are especially frightening or destructive. That is why the Kennedy amendment regards crimes that are motivated by race, color, national origin, or religion as really, really bad; and regards crimes that are motivated by gender, sexual orientation, or disability as really bad; but regards crimes that are motivated by other causes (including other kinds of hatreds) or by unknown causes as only just bad.

In his "Dear Colleague" letter Senator Kennedy said, "In the last few weeks, we have seen entire communities in California, Illinois, and Indiana terrorized by hatred. Hate crimes are uniquely destructive and divisive. They injure not only the immediate victim, but the entire

community and sometimes the entire country.” This is an interesting and important argument; it suffers, however, from the defect of not being true. One need only consider the effect of school shootings or a bombing or a series of child abductions or a serial killer to see that hate crimes are not *uniquely* threatening.

**Hate Crimes and All Crimes.** Some hate crimes are especially brutal and frightening, but most are not. Indeed, most “hate crimes” are shouting matches where not even a punch is thrown. On the other hand, in 1997 (the most recent year for which there are accurate numbers) there were more than 1.6 million murders, rapes, robberies, and aggravated assaults reported to the police. Senator Kennedy wants us to believe that the hate crimes are the more frightening. What is truly frightening, though, is the fearmongering that is carried on in the name of hate crimes.

**The Facts in the Numbers.** We hear sometimes that new hate crimes laws are necessary because of the large and ominous and growing threat posed by such crimes. Happily, that claim is not true. Crime itself is, indeed, a large and ominous (but shrinking) threat to individuals and communities, but hate crimes are not numerous and, because they are so rare, their threat is, frankly, almost nonexistent. The facts are shown below:

### Crimes Against Persons, 1997

	All Offenses	Hate Crimes Offenses	
		Number	Rate per 10,000 offenses
Murder	18,210	8	4.4
Forcible rape	96,120	9	0.9
Robbery	497,950	144	2.9
Aggravated Assault	1,022,490	1,237	12.1
Simple Assault	not reported	1,800	----
Intimidation	not reported	3,814	----

[Source: Federal Bureau of Investigation, *Crime in the United States, 1997* (Uniform Crime Reports), page 66 (Table 1), and *Hate Crime Statistics, 1997*, page 9 (Table 3).]

The data also can be presented in this way:

- For every 20,000 murders, 9 are hate crimes (0.044 percent).
- For every 20,000 rapes, 2 are hate crimes (0.009 percent).
- For every 20,000 robberies, 6 are hate crimes (0.029 percent).
- For every 20,000 aggravated assaults, 24 are hate crimes (0.121 percent).

**The Facts and the Fear of Crime.** As can be seen, the number of hate crimes in the United States annually is a tiny, tiny fraction of the total. Ask yourself this (whatever your race, religion, gender, sexual orientation, or disability), are you more anxious about the 18,202

murders for God-knows-what wicked-reasons, or are you more concerned about the eight murders for what the government deigns to call "hate"? Of course, the question can be repeated for each of the other violent crimes.

**The Hate Crimes that Are *Not* Even Counted as Violent Crimes.** The two crimes that count so heavily in the hate crimes statistics (simple assault<sup>1</sup> and intimidation<sup>2</sup>) are *not even included* in the Uniform Crime Reports (because they are not regarded as *violent* crimes). Nevertheless, these two minor offenses constituted 80 percent of all hate crimes against persons that were reported in 1997!

**What about those Brutal Murders?** These facts were not mentioned in the statements on the Kennedy amendment. Several recent, brutal crimes were mentioned, but the excellent job the States have done in prosecuting those crimes was overlooked, which is most unfortunate because *all* of the cases have been handled with dispatch and due process. Criminals are being sentenced to prison and even to death. Some supporters of hate crimes seem to think it is more important to brand a murderer as "a hater" than to send him to the electric chair. Senator Kennedy is, of course, a long-time opponent of capital punishment.

Here is what the States are doing about the recent hate crimes that attracted the most attention:

In **Texas**, one murderer of James Byrd, Jr. has been convicted and sentenced to death. Two other suspects will be tried in the fall. Mr. Byrd is the African-American who was dragged to death along a rural road.

In **Wyoming**, one murderer of Matthew Shepard pleaded guilty to avoid a possible death sentence and was sentenced to two life sentences without the possibility of parole. A second suspect faces trial in October on charges of first-degree murder, kidnaping, and aggravated robbery. If convicted, he faces the possibility of death. A third person pleaded guilty for her role as an accessory after the fact and was sentenced to a term of 15 to 24 months. Mr. Shepard is the college student who was beaten and left for dead on a roadside fence. (Notwithstanding the furor over Shepard's gruesome murder, there is considerable doubt that he was murdered because of his sexual orientation.)

In **Alabama**, one murderer of Billy Jack Gaither has pleaded guilty to capital murder.

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<sup>1</sup> "Simple assault" is an unlawful attack that does not result in serious injury and where no weapon is used. The definition includes attempts.

<sup>2</sup> "Intimidation" is the use of threatening words or conduct to unlawfully place another person in reasonable fear of bodily harm. "Intimidation" usually means angry shouting and threatening and fist waving.

The prosecution is expected to recommend a sentence of life imprisonment without parole, but the presiding judge told that prisoner that a sentence of death is still a possibility. A second defendant will be tried this month. Mr. Gaither was abducted, beaten to death, and his body burned on a pyre of old tires.

In **Illinois** and **Indiana**, Benjamin Nathaniel Smith was accused of wounding nine and killing two in a racially motivated shooting spree over the Fourth of July weekend. When the police closed in, Smith turned the gun on himself.

In **California**, two brothers who are linked to a white supremacist group that is suspected of arsons at three synagogues have been charged with killing a homosexual couple. The brothers could face the death penalty if convicted. They are being held without bail.

It takes gall to point to these crimes as demonstrating the need for more federal laws against hate crimes.

**Hate Crimes Do Not Require Hatred.** Ironically, the Kennedy amendment does not require *hatred* at all. It requires only that the crime be committed "because of" the "actual or perceived" race, color, religion, national origin, gender, sexual orientation, or disability "of any person," whether or not that person is the victim of the crime. For example, a person may rob a disabled person because of the belief that disabled persons are less likely to fight back, not because he has any animosity toward the disabled, and that robbery could be a hate crime under the Kennedy amendment. On the other hand, a person who robbed an elderly person because he thought the older person would be less likely to fight back would not be subject to the Kennedy amendment even if he hated that particular person or all older people.

**"Sexual Orientation."** The Kennedy amendment includes "sexual orientation." Whether "sexual orientation" belongs among the categories of race, sex, and religion is a recurring question, and in a majority of States the answer has been "no."

The Kennedy amendment will make it possible for a man who slugs another man because of a sexual overture to be charged with a federal hate crime and imprisoned for up to 10 years and fined. The American people will understand if the punch constitutes an assault (as it does), but they may not understand why this sort of response to an offensive sexual overture should constitute a federal hate crime.

There are numerous other interesting lines of inquiry about the Kennedy amendment, and we expect the House hearings will pursue some of them.

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